Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

MAHFOUZ EL SHAHAWY,

Petitioner,

v.

MARILYN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), authorize the imposition of liability for attorneys' fees upon a plaintiff whose case, while lost, was based upon evidence of ethnic discrimination that the district court found sufficient to withstand summary judgment and, after a trial proffer, sufficient to present to the jury?

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The per curiam affirmance without opinion by the United States Court of Appeals for the Eleventh Circuit is unreported. It is reproduced in the appendix at App. 1a. The denial of rehearing is reproduced at App. 33a. The order of the district court determining that the defendants were entitled to attorneys' fees under 42 U.S.C. § 1988 is unreported. It is reproduced in the appendix at App. 4a-32a.

STATEMENT OF JURISDICTION

The original opinion of the United States Court of Appeals for the Eleventh Circuit was rendered on February 16, 2001. A timely motion for rehearing was denied on March 28, 2001. App. 33a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988.

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its

> discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

STATEMENT OF THE CASE

Mahfouz El Shahawy, M.D. sued the Sarasota County Florida Public Hospital Board (SCPH) and its members "alleging various civil rights violations (based primarily on his Egyptian descent and national origin, but also on the exercise of his First Amendment rights and general due process theories), as well as state contract law and tort claims." App. 6a.

The dispute arose from the Board's 1991 denial of hospital privileges to Dr. Shahawy, and ensuing litigation which resulted in the Board settling with a payment of $500,000 to Dr. Shahawy, his releasing the Board and its members, and the Board agreeing "to reconvene consideration of Plaintiff's application . . . under a modified version of the scheme set forth in the SCPH Bylaws." App. 6a.

The district court recounted the next events:

> As with the consideration of Plaintiff's application originally in 1991, this modification scheme initially produced a favorable reconsideration of Plaintiff's application. However at the final meeting at which the full Board considered Plaintiff's application, Plaintiff became disruptive and threatened the Board. The Board thereafter denied Plaintiff's application. Relying in part on Plaintiff's conduct before them,

> the Board concluded that Plaintiff posed a threat to the providing of patient care at and otherwise [sic] to the smooth operation of SCPH.

App. 6a.

That action prompted Dr. Shahawy's lawsuit leading to this petition, a lawsuit that the district court described this way: "[T]he core of his Complaint, both factually and legally, was the assertion that the individual Defendants bore prejudice against Plaintiff because of his Egyptian descent and national origin and thus conspired to, and did in fact, deny his privileges application." App. 7a-8a.

The strongest evidence of discrimination that Dr. Shahawy had was testimony from Board Member Bonniejean Christensen. The Court required a proffer of her testimony before submitting it to the jury. The proffer included this colloquy:

> Q. At any time have you ever heard anyone refer to Doctor Shahawy in a way which exhibited to you some degree of national origin animus or which exhibited to you some prejudice based upon his accent or other distinguishing characteristics?
>
> A. Yes, sir.
>
> Q. Tell us in summary form, if you can, what you heard and who you heard say that.
>
> A. All right. During the electioneering period, comments about his — what they — what

made it seem as though he were inarticulate in English, which he isn't. It's just that he has an accent. There were comments about his being a "camel driver" and a "nigger on the Nile" and an African and comments about his being married to a white woman. And these things were from that period before my election through my tenure on the Board that such comments were made.

Q. All right. We're going to try to get a little bit more specific, if we can.

Can you identify any of the speakers of these comments as you've just relayed to us? Who, in other words, were making the statements?

A. It's sort of like the dirty jokes that one Board member tells: I don't remember them. I know which group of people, because normally they were standing in groups.

Q. All right. Identify for us the members of the group who were standing as a part of a group.

A. One group —

THE COURT: When are we talking about this group, now? We're talking about during the electioneering?

THE WITNESS: Yes, Your Honor.

THE COURT: In the fall of 1991?

THE WITNESS: Yes, Your Honor.

One group of candidates was Mr. Albertson and Mrs. Cobb and Mr. Moss, and I could identify Mr. Albertson's voice and it wasn't his. I can't be more specific than that.

THE COURT: What did you hear?

THE WITNESS: That was the one about the camel driver and something about his lack of knowledge of English.

THE COURT: And you don't which of — there was a group of three, Albertson, Cobb and Moss. You know it wasn't Albertson.

THE WITNESS: Yes, sir. And beyond that, I cannot go.

THE COURT: You heard the phrase "camel driver." You don't know what was said about "camel driver" other than just hearing that phrase?

THE WITNESS: That's what I heard that made me turn toward the group and I saw who the group was. And then they were going on about the language.

THE COURT: You said "camel driver," and I wrote down "lack of." What was it that I missed?

THE WITNESS: I think I used the word "articulation," but I'm sure that's not the word they used.

THE COURT: All right.

BY MR. SMITH:

Q. Now, in connection with that conversation, did you gain a sense as to whether they were speaking of Doctor Shahawy specifically?

A. Yes. The name "Shahawy" came trippingly to their lips quite frequently.

THE COURT: At that time?

THE WITNESS: Yes, sir. There were about 14 people running against him, most of them encouraged by the hospital administration.

BY MR. SMITH:

Q. All right. Now, once you became a member of the Sarasota County Public Hospital Board, did you at any time thereafter hear Doctor Shahawy referred to in disparaging terms which would indicate to you some degree of national origin animus.

A. Yes. For the next four years of my tenure, comments about his temperament being different and his attitude toward women being different and his not even being a citizen kind

of remark and being married to a white woman. And then something about — I think they meant the word "wog," but whoever said it used "wop," which is not an accurate derogatory term. That is, an American would make that mistake, not a British citizen.

Q. All right. Now, can you attribute any of those statements to any individual or group of individuals who made such comments?

A. The groups that sort of interwove with each other and made such comments consists of Moss, Cobb, Wilkin, Lee.

THE COURT: Who?

THE WITNESS: Wilkin. I don't believe she's involved in this. She was absent when the vote was taken.

THE COURT: Wilkin and who?

THE WITNESS: Lee.

I'm not sure about Nash. He tended to stand around and grunt a little bit, not to say much aloud, except when he was attacking me.

BY MR. SMITH:

Q. What do you recall being said by those individuals?

A. Things about his nationality as not being an American, not being a citizen, being married to a white woman. Someone was using an expression "out of Africa" or maybe just "African," because "out of Africa" would be a literary thing. And I doubt if our Board members would use that expression.

Q. All right. Do you ever recall Mrs. Lee specifically talking about African origin?

A. She said something once when she was angry about he'd be on my doorstep, and it was something about — I don't know if it was darkies, or in the dark, or what ever it was; and then something about Africa or African. But she was terribly angry and just said, He'll never be at my door. I don't allow people to do that.

Q. Okay

THE COURT: Who said that?

THE WITNESS: Mrs. Lee. It was after a meeting or during a recess in a meeting, and I don't remember why she was so upset and angry at that time.

BY MR. SMITH:

Q. Are there any other comments that you can recall having been made by anyone on the Board during the period of your tenure there which indicated to you some degree of national origin animus?

A. His language, his thought process, his conduct, all of these things seemed to hark back to his being an Egyptian.

THE COURT: No, no, no. I'm not going to permit that. You're going to have to be more specific. She's going to have to be more specific.

R. 27-264-1-10

Shortly thereafter, the district court decided the jury would hear the proffered evidence.

THE COURT: Now, I think that there has been sufficient basis, pursuant to this proffered testimony, to persuade the Court that the Plaintiff ought to be permitted to elicit this testimony that has been presented.

Now, Count 3 of the — or Count 4 of the complaint is predicated on national origin discrimination. That is a count that has been filed against the Board.

It seems to me that with respect to the issue as to the witness not being able to pinpoint precisely who may have made a comment, or comments, on a certain occasion, but knows that it emanated from Board members, that is probative of the issues regarding discriminatory animus. The remarks to which she has testified, in the Court's view, are not too remote.

> There's just so much that the Court can do to parse through each and every comment that was made, and at some point I think it becomes unreasonable for the Court to require that a witness who has assertedly heard and observed a number of comments and remarks by pertinent people, it almost becomes — well, it's not surprising that the witness would be unable to specifically recall exactly which of the Board members made the comment on a certain occasion.
>
> Now, the jury is free to believe or disbelieve this witness.

R. 27-264-18-20.

The jury never got to consider the testimony. At the end of Dr. Shahawy's case-in-chief, the court granted a judgment as a matter of law against Dr. Shahawy. App. 10a.

> In general, the court found that the evidence supporting such [civil rights] claims was "wanting" — that the Plaintiff had done little more than point to the fact that he is of Egyptian ancestry, that his application was denied, and that all of the Board members voted against him, and attempted to force the inference that such was a result of a wide ranging conspiracy.

App. 10a-11a. The court believed that:

> the testimony of alleged slurs and epithets on which he relied to establish the invidiously

> discriminatory animus required for these claims was wholly lacking in one of several ways: the witness was unable to give attribution; the witness was vague as to the specifics of the remarks either as to time or content or both; or the remarks did not necessarily carry with them the putative discriminatory animus.

App. 11a. Despite having allowed the proffered testimony, the court wrote: "At trial, the slurs could hardly be recalled, much less attributed to any certain time or any particular individual, much less a Board member. . . ." App. 21a.

The district court's order holding Dr. Shahawy liable for attorneys' fees pursuant to 42 U.S.C. § 1988 concluded that Dr. Shahawy's claims met the *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), standard: that his civil rights claims were frivolous, groundless, and in addition, in bad faith. App. 16a-29a.

The court viewed Dr. Shahawy's theory of discrimination as "rank conjecture: Plaintiff was Egyptian; Plaintiff and the Board had a rancorous past, including litigation; Plaintiff's application was again denied; therefore such denial must have been based on Plaintiff's ethnicity/national origin and/or his speech critical of the Board and SCPH." App. 22a. The court spoke of the summary judgment order warnings "of the thin ice on which he would be moving if he continued to press his claims," and concluded: "He did not heed the warning." App. 22a.

In his assessment of Dr. Shahawy's motivation, the court addressed the doctor's prior litigation against the Board, his appeals in those cases, including a prior denial of certiorari

by this Court. App. 26a-28a. Finally, the court concluded that except for Dr. Shahawy's breach of contract claim against the hospital for the hospital's failure to follow the terms of the $500,000 settlement agreement it made with Dr. Shahawy, the case was brought in bad faith:

> As the Court has otherwise stated and indicated, Plaintiff's contract claim had an arguable foundation. But the Court is convinced that the remainder of Plaintiff's claims were brought solely to vex and oppress the Board, especially the individual defendants.

App. 29a.

Having found the prevailing defendants to be entitled to attorney fees (App. 4a-32a), the court entered judgment against Dr. Shahawy in the total amount of $380,000 plus $25,000 in 42 U.S.C. § 1988 expert fees. App. 2a-3a. The Court of Appeals affirmed the judgment. App. 1a.

REASON FOR GRANTING THE WRIT

The decision below is " 'an incorrect application of Supreme Court precedent.' " Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, Kenneth S. Geller, SUPREME COURT PRACTICE, SEVENTH EDITION (1993), *quoting* W. Rehnquist, THE SUPREME COURT 265 (1987).

The precedent is *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The *Christiansburg* standard for awarding attorneys' fees to prevailing defendants in civil rights cases is that:

> a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim

> was frivolous, unreasonable, or groundless, or that the plaintiff *continued to litigate after it clearly became so.* And, needless to say, if a plaintiff is found to have brought or continued such a clam in *bad faith*, there will be an even stronger basis for charging him with fees incurred by the defense.

Id., 434 U.S. at 423 (footnote omitted, first emphasis supplied, second emphasis in original).

Dr. Shahawy's discrimination claim could not have been frivolous, unreasonable, or groundless when he had the testimony of a member of the hospital board who heard other members refer to Dr. Shahawy as a "camel driver" and a "nigger on the Nile" and make comments about his being "married to a white woman." It cannot be said that Dr. Shahawy continued to litigate after his claim "*clearly became*" frivolous, unreasonable or groundless when the trial court concluded that there was enough evidence to survive summary judgment and enough evidence to lead the court to allow the jury to hear one Board member's testimony because she could testify that the offensive remarks "emanated from Board members," and that testimony "is probative of the issues regarding discriminatory animus." R. 27-264-19, p. 9, *supra*.

It is true that the trial court thought Dr. Shahawy's case was on "thin ice," but that does not equate with it being "clearly" being frivolous. "Clearly" means "without equivocation," "without doubt." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, Gramercy Books, Division of Random House Value Publishing, Inc. (1996).

The trial court wrote that "[t]he scant deposition testimony and averments presented by Plaintiff in opposition to summary judgment on his civil rights claims, which the court thought were barely sufficient to withstand summary judgment, completely evaporated — or rather, failed to arise at all — at trial." App. 21a. But that conclusion does not mean Dr. Shahawy fell on the wrong side of the *Christiansburg* test. "Barely sufficient" does not mean "clearly" frivolous, unreasonable or groundless. "Evaporated" or "failed to arise" at trial, after holding at trial that the proffer was good enough to let the jury hear it ("I think it is enough that she will be permitted to testify regarding the comments and remarks that were made at various times, and so the Court will permit the proffered testimony with the exception that I just mentioned") (R27-264-20) does not mean that Shahawy continued to litigate after it became "clear" that his claim was frivolous, unreasonable, or groundless. If the court deemed the evidence good enough to be heard by the jury, how could its subsequent deficiency be clear to Dr. Shahawy?

Dr. Shahawy had a reasonable basis for his suit. Even the trial court concluded that the Board's alleged breach of its contract to reinstate Dr. Shahawy had a basis in fact and law. If the Board was capable of breaching its contract after it had paid $500,000 to Dr. Shahawy to settle his claim for the prior deprivation of hospital privileges, would it be unreasonable for Dr. Shahawy to believe that discriminatory animus existed the second time around, where a Board member recounted tales of "nigger on the Nile?" *Christiansburg* states:

> [It] is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff

> did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial.

434 U.S. at 421-22.

The decisive facts turned out to be unfavorable to Dr. Shahawy. But to saddle Dr. Shahawy with fees would be contrary to Congress' goal of "promoting the vigorous enforcement of the provisions" of the civil rights laws. *Id.* at 422. Congress "wanted to protect defendants from burdensome litigation having *no* legal or factual basis." *Id.* at 420 (emphasis supplied). "No," in that context means "not any." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE. It cannot be said that Dr. Shahawy did not have any legal or factual basis for his civil rights claims.

Given the facts that Dr. Shahawy had — facts that the trial court allowed to survive summary judgment and facts that the court vetted before letting them be heard by the jury — the trial court's finding of bad faith must have been the product of his frustration with Dr. Shahawy. He chided Dr. Shahawy, saying

> charges of discrimination against another on the basis of one's ethnicity or national origin is a serious matter; it should not be reflexive when one happens to fail at a particular endeavor. . . . For Plaintiff,

> these civil rights laws, which exist to ensure equality and fair treatment, were merely sophisticated cudgels he hoped to use to beat the Defendants into submission.

App. 29a.

Dr. Shahawy did not "fail at a particular endeavor." Dr. Shahawy's 1991 application for privileges "received a favorable recommendation," which later "became negative based on Plaintiff's argumentative and disruptive conduct before certain committees." App. 5a. Was the ultimate 1991 negative recommendation driven by those who saw Dr. Shahawy as a "camel driver" or was Dr. Shahawy argumentative because he was viewed as a "nigger on the Nile?" It does not matter as to that denial of privileges, because "the Board paid Plaintiff $500,000" and agreed to reconsider his application. App. 6a. The restarted process again "initially produced a favorable recommendation." App. 6a. But when the full Board again denied him, claiming he "became disruptive and threatened the Board" (*id.*), it is not surprising that Dr. Shahawy suspected that racism was the reason, especially where a Board member confirmed his fears. Those facts are not the facts of "bad faith" litigation. Dr. Shahawy may not have had enough evidence to prove his case, and his resort to the courts may have tried the patience of the trial judge, but Dr. Shahawy had good reason to doubt the good faith of the defendants' denial of hospital privileges to him.

CONCLUSION

The decision below is inconsistent with, and erodes the principles of, *Christiansburg Garment Co. v. EEOC*. It presents a question of public importance because of the harsh and chilling impact a substantial attorneys' fee award will have on plaintiffs seeking to vindicate civil rights claims — an impact contrary to the intent of Congress. Certiorari should be granted to review the decision below and reaffirm *Christiansburg's* stringent principles for awarding attorneys' fees to prevailing defendants in civil rights cases only when a plaintiff's claims have *no* factual basis, or are *clearly* frivolous, unreasonable, or groundless.

Respectfully submitted,

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